



## 38 CFR Part 1

RIN 2900-AP90

### Consent for Release of VA Medical Records

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** The Department of Veterans Affairs (VA) is withdrawing a document published in the *Federal Register* on January 19, 2018, proposing to amend its regulations to clarify that a valid consent authorizing VA to release the patient's confidential VA medical records to a health information exchange (HIE) community partner may be established not only by VA's physical possession of the written consent form, but also by the HIE community partner's written (electronic) attestation that the patient has provided such consent.

**DATES:** The proposed rule published at 83 FR 2762 on January 19, 2018, is withdrawn as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The docket for this action is available at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Stephanie Griffin, Director, Veterans Health Administration Information Access and Privacy Office, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; [Stephania.griffin@va.gov](mailto:Stephania.griffin@va.gov), (704) 245-2492 (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** In a document published in the Federal Register on January 19, 2018, VA proposed to amend its regulations concerning patient consent

to release VA medical records. 83 FR 2762. As explained in more detail below, VA is withdrawing the proposal.

Under 38 U.S.C. 7332, VA must keep confidential all records of identity, diagnosis, prognosis, or treatment of a patient or subject in connection with any program or activity carried out by VA related to drug abuse, alcoholism or alcohol abuse, infection with human immunodeficiency virus, or sickle cell anemia, and must obtain patients' written consent before VA may disclose such protected information unless authorized by the statute. Although section 7332 does not explicitly require that the written consent be physically in VA's possession at the time of the disclosure, VA had interpreted the statute to require such possession, and, therefore, applied the corresponding regulation 38 CFR 1.475 consistent with that interpretation. VA had reexamined that statutory interpretation in light of contemporary health care industry standards, and published the proposed rule, at 83 FR 2762, to revise § 1.475 to permit VA to release section 7332-protected medical records to eligible community partners, even if VA does not physically have the patient's written consent, provided that specified criteria are met.

VA explained in the proposed rule that it has entered into an agreement to participate in a health information exchange (HIE) to help facilitate the transfer of information between different organizations. An HIE is the electronic transfer of health information among organizations according to nationally recognized standards. The organizations that participate (HIE community partners) range from community health care providers and health plans to governmental agencies providing benefits, such as the Social Security Administration (SSA).

After the proposed rule was published, on June 6, 2018, the President signed into law the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 (hereafter referred to as the MISSION Act), Public Law 115-182, 132 Stat. 1395.

Section 132 of the MISSION Act amended section 7332(b)(2)(H) to authorize disclosure of 7332-protected records, with or without the written consent of the patient or subject of the record, to a non-VA entity (including private entities and other Federal agencies) for purposes of providing health care, including hospital care, medical services and extended care services, to patients or performing other health care-related activities or functions. These amendments to section 7332 provide VA with greater flexibility to share records and authorize VA to implement an opt-out model for the purposes of providing health care, and on December 13, 2019, we published a separate proposed rule to implement these recent amendments. See 84 FR 68065.

As a result of the amendments to section 7332 made by section 132 of the MISSION Act and the rulemaking published December 13, 2019, at 84 FR 68065, we have determined the rulemaking published January 19, 2018, at 83 FR 2762, is no longer necessary. However, we note that the amendments to section 7332 did not provide VA with the authority to make disclosures for other purposes such as exchanging information with other governmental agencies providing benefits. To ensure that withdrawal of the rulemaking published January 19, 2018, at 83 FR 2762, would not affect disclosures for other purposes, VA identified that SSA is the only other government agency with which VA exchanges confidential VA medical records for purposes of providing benefits. VA discussed with SSA whether the rulemaking published January 19, 2018, at 83 FR 2762, was still needed for VA to exchange information with SSA to provide benefits, and SSA determined it was no longer needed for that purpose. SSA further indicated they have no plans to send VA attestations of valid authorizations via HIE without also sending the authorization form as a PDF or other digital image, and that they are developing a software solution to review non-digitally created authorizations for validity in order to provide the attestation along with a digital image of the form to VA via HIE. Therefore, the proposed rule published January

19, 2018, at 83 FR 2762, is no longer necessary. Accordingly, VA is withdrawing this proposal.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Assistant Secretary for Congressional and Legislative Affairs, Performing the Delegable Duties of the Chief of Staff, Department of Veterans Affairs, approved this document on November 2, 2020, for publication.

***Consuela Benjamin,***

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